Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. ~~77-1~~1122

DAVID ANTHONY,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

DAVID ANTHONY,

vs. Petitioner

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on October 27, 1977.

CITATIONS TO OPINIONS BELOW

The judgment of the Court of Appeals is unreported. Said Opinion is printed and attached hereto and made a part hereof as Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals

affirmed the conviction of petitioner on October 27, 1977.

All questions raised in this instant Petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. If, before a taxpayer embarks upon a course of action which he does not know is illegal, the taxpayer discusses said course of action with an Internal Revenue Agent who assists, encourages and advises the taxpayer to engage in said course of action for the sole purpose of obtaining a conviction, is a conviction later obtained thereby violative of the taxpayer's constitutional right to due process of law?

2. Does a Government Agent who knows that a taxpayer is unaware that he is participating in illegal activity have a duty to warn said taxpayer of the illegality?

CONSTITUTIONAL PROVISIONS

The constitutional provision involved in the instant case is the Due Process Clause of the Fifth Amendment to the United States Constitution, printed in 1 U.S.C. XLVI.

STATEMENT OF THE CASE

On December 15, 1975, a Federal Grand Jury for the Central District of California returned an Indictment charging the petitioner, David J. Anthony, in three counts, with attempt to bribe and bribery of an Internal Revenue agent, in violation of 18 U.S.C. § 201(b)(1) (C.T. 1)[1/]. The petitioner pled not guilty to the charges (C.T. 4). On May 6, 1976, the petitioner waived trial by jury (C.T. 12) and a Court trial commenced before the Honorable A. Andrew Hauk, United States District Judge. Prior to verdict, the petitioner moved for judgment of acquittal and for reduction of the charge (C.T. 17). The motions were denied.

On May 26, 1976, the Court dismissed the charges in Count One of the Indictment

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1/ Reference to "C.T." is to the Clerk's Transcript.

(R.T. 216; C.T. 15)[2/]. On May 27, 1976, the Court found the petitioner not guilty of Count Two of the Indictment (R.T. 447; C.T. 16) and guilty of Count Three (R.T. 488; C.T. 39).

On July 12, 1976, the petitioner was sentenced to the custody of the Attorney General for a period of fifteen (15) years and fined Twenty Thousand Dollars ($20,000), subject to a ninety (90) day psychiatric study.

On January 3, 1977 (R.T. 485), the judgment was modified in accordance with the results of the study (18 U.S.C. § 4205(c)) to a fine of Fifteen Thousand Dollars ($15,000) and three (3) years probation (C.T. 97).

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on October 27, 1977.

On November 14, 1977, the petitioner filed a Petition For Rehearing. On December 19, 1977, the Petition For Rehearing was denied. A copy of the Order denying

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2/ Reference to "R.T." is to the Reporter's Transcript.

the Petition For Rehearing is attached hereto as Appendix B.

STATEMENT OF FACTS

The petitioner was the president and sole shareholder of Anthony Associates on July 15, 1975, when an agent from the Internal Revenue Service, Rudolfo Masigla (hereinafter referred to as Masigla), met with the petitioner for the purpose of conducting an audit of the corporate tax return for the fiscal year ending November 30, 1974 (R.T. 15-16). Masigla requested and reviewed records in the petitioner's possession in an attempt to reconcile what was on the return (R.T. 17). At that time, the petitioner mentioned to Masigla that the City of Gardena was pressuring its gambling establishments, including one in which the petitioner had an interest, to dissolve corporations holding ownership interest (R.T. 21).

On September 5, 1975, Masigla telephoned the petitioner regarding information he had requested dealing with the petitioner's gross receipts and his partnership tax returns (R.T. 24).

Masigla again met with the petitioner on September 8, 1975. At that time, they tried to clarify the way in which the gross receipts on the corporate tax return were arrived at (R.T. 25).

On September 12, 1975, Masigla returned a telephone call from the petitioner and arranged a meeting for that afternoon to discuss a subject that the petitioner believed might affect the audit (R.T. 28). At the meeting, the petitioner asked Masigla if it were possible to treat his corporation as an individual or sole proprietorship (R.T. 29-30). Masigla regarded the question as a proper one but did not know the answer (R.T. 110).

The petitioner explained that the City of Gardena was still pursuing the corporate pointholders in card clubs, which placed the petitioner in jeopardy of losing his points unless there was a way to treat the corporation as an individual. The petitioner explained that his brother was being charged Seventeen Thousand Dollars ($17,000) in legal fees to liquidate a similar type of corporation, and he asked Masigla if he could liquidate the

corporation for him. He offered Masigla Two Thousand Dollars ($2,000) and a trip to Las Vegas for his services in that regard (R.T. 30, 36).

Masigla told the petitioner that this procedure might be possible and that he would research the problem to see if it could be done (R.T. 37). Masigla, however, was aware of the rule that an Internal Revenue agent cannot take outside compensation for his work (R.T. 111). Rather than refuse the petitioner's request, Masigla left the offer open and reported it to Internal Security Inspection as an attempted bribe (R.T. 37, 112).

At no time did Masigla tell the petitioner that as an Internal Revenue agent, he was not permitted to do outside work. In his mind, Masigla believed that the corporation possibly could be treated as a sole proprietorship by a legal process. He therefore researched the subject. He intended to see how the change in status would affect the audit but had no expectation of compensation for outside employment (R.T. 120).

Masigla understood that he would have to physically dissolve the corporation in order to remove the partnership's interest from it. He found that there was no way of attributing a corporate asset to an individual tax return or of treating it as a sole proprietorship without liquidation. Nevertheless, he did not expressly tell the petitioner at any time that he personally was not allowed to liquidate the corporation (R.T. 121).

Masigla arranged to meet with the petitioner on October 2, 1975 [3/]. At that meeting Masigla asked the petitioner whether he was interested in dissolution or in transferring the interest of the partnership to himself. He told the petitioner he could liquidate the corporation in any way the petitioner desired. He explained the legal procedure involved and agreed to use the liquidation process

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3/ The October 2, 1975 meeting was electronically recorded and later transcribed. The transcript was admitted into evidence as Exhibit 3a. Unless otherwise referenced, the following information regarding that meeting is taken from that transcript.

that would result in the least tax expenditure, and the best tax advantage within the law.

While discussing the various legal methods of liquidation, Masigla explained that he would not be able to utilize certain code sections of the Internal Revenue Code as the situation here involved did not exactly relate thereto. Yet, he asked the petitioner if he wanted to be involved in liquidation, and told him that he would try to fit his facts into the code section. Masigla requested the minutes of the corporation, telling the petitioner that he would have to do further research as this was outside of his normal type of work.

When the petitioner asked Masigla if he had checked with his supervisor as yet to find out if this could be done (in a normal tone of voice), Masigla laughed and stated that he did not plan to. He stressed that he was putting the research in priority. He did not tell the petitioner that as an Internal Revenue agent he could not moonlight (R.T. 117).

Masigla told the petitioner that there were means to liquidate the corporation the way he wanted it liquidated although Masigla knew this was false. The purpose of the meeting was to find out exactly what the petitioner wanted done. Masigla was instructed by the Internal Revenue Service to submit to the petitioner's requests (R.T. 122). Thus, he never told the petitioner that what they were doing was illegal (R.T. 123) although the Internal Revenue's code of ethics forbids its agents from doing outside work relating to accounting, taxes, or business without permission of the authorities (R.T. 141). Masigla never requested that permission (R.T. 170).

During this entire period, beginning September 12, 1975, Masigla knew that the City of Gardena wanted the petitioner's interest in the gambling club to be owned personally; that the petitioner had just changed accountants; that the first accountant was not giving the new accountant the proper figures, and that the petitioner and his new accountant were therefore having trouble getting the

figures to liquidate (R.T. 170-171).

On October 9, 1975, Masigla again met with the petitioner to discuss the audit [4/]. At that meeting, the corporate minutes were discussed. Masigla stated that he had found additional information regarding the liquidation procedure, and he made a definite commitment that he would do the work.

Masigla suggested that the date of liquidation be predated to 1974 so that the petitioner would not have a tax increase and stated that he presently would "make-up" the three prerequisites for liquidation, fill out and file a Form 964, and predate the minutes. Masigla also instructed the petitioner on how to word the corporate minutes.

When the petitioner asked Masigla whether he would need to get an attorney to handle

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4/ The October 9, 1975 meeting was electronically recorded and later transcribed. The transcript was admitted into evidence as Exhibit 4a. Unles otherwise referenced, the following information regarding the October 9 meeting is taken from that transcript.

the liquidation, Masigla answered, "to do this taxes, no, no, no, because my report will cover that."

Masigla told the petitioner that he would have to state in the minutes that the corporation wasn't functioning as a corporation, to provide a motive for dissolution. He also stated that he was doing some of his work for the petitioner at home.

Masigla told the petitioner what the minutes had to contain (R.T. 192), what forms had to be signed, and supplied petitioner with the forms. Masigla was the first person to ever mention false entries (R.T. 193). He never explained to the petitioner that the corporation could be dissolved by legal methods.

On October 10, 1975, the petitioner telephoned Masigla and asked him why he needed the corporate minutes and personal tax returns. Masigla told him that he needed the tax return in order to attribute the adjustments to his personal tax return upon liquidation of the corporation (R.T. 79).

On October 21, 1975, Masigla met with the petitioner one final time[5/]. During that meeting, the liquidation papers were predated at Masigla's direction. The predating of the papers on October 21, 1975 was the subject of Count Three of the Indictment -- the Count under which the petitioner was convicted. The corporate minutes dated July 4, 1974 and July 1, 1975 were never signed.

At the close of the testimony the petitioner moved for judgment of acquittal on the ground that he had been entrapped. The petitioner was acquitted of Counts One and Two of the Indictment, which related to the dates of October 2, 1975 and October 9, 1975 respectively, because the Court did not find that the petitioner had the intent to participate in illegal activity on those dates. The petitioner was convicted of Count Three of the Indictment, which related to the date of

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5/ The October 21, 1975 meeting was electronically recorded and later transcribed; said transcript was admitted into evidence as Exhibit 8a. Unles otherwise referenced, the following information regarding the October 21 meeting is taken from that transcript.

October 21, 1975, the date the corporate minutes were predated (C.T. 39).

On appeal, one of the petitioner's primary contentions was that he never intended to do anything illegal by asking Masigla to do this work for him and that Masigla should have informed him that he could not accept compensation.

In its Opinion affirming the judgment of the District Court, the United States Court of Appeals for the Ninth Circuit determined:

> "Considering the entire testimony the trier of fact could justifiably believe that appellant was proposing a criminal scheme and had the necessary criminal intent to violate the statutory requirements. See Neely v. United States, 274 F.2d 389 (9th Cir. 1960). Under those circumstances we do not review the fact finding of the trial court except to determine whether there was substantial evidence considered in a light most favorable to the government, to support a conclusion of defendant's guilt beyond a reasonable

doubt. United States v. Pheaster, 544 F.2d 353, 383 (9th Cir. 1976). Here, the test was amply met.

"We have considered appellant's related assignments and find them to be without merit." United States v. David Anthony (Appendix A).

On November 14, 1977, petitioner filed a Petition For Rehearing before the Ninth Circuit Court of Appeals. The petitioner requested a rehearing on the ground that the government agent herein had a duty to inform the petitioner that outside employment would be illegal, and that this situation should have been given further consideration by the Court of Appeals in light of the issue it presents.

The Petition For Rehearing was denied without Opinion.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF, BEFORE A TAXPAYER EMBARKS UPON A COURSE OF ACTION WHICH HE DOES NOT KNOW IS ILLEGAL, THE TAXPAYER DISCUSSES SAID COURSE OF ACTION WITH AN INTERNAL REVENUE AGENT WHO ASSISTS, ENCOURAGES AND ADVISES THE TAXPAYER TO ENGAGE IN SAID COURSE OF ACTION FOR THE SOLE PURPOSE OF OBTAINING A CONVICTION, A CONVICTION LATER OBTAINED IS THEREBY VIOLATIVE OF THE TAXPAYER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND WHETHER A GOVERNMENT AGENT WHO KNOWS THAT A TAXPAYER IS UNAWARE THAT HE IS PARTICIPATING IN ILLEGAL ACTIVITY HAS A DUTY TO WARN SAID TAXPAYER OF THE ILLEGALITY

In this particular case, a taxpayer asked a government employee to work for him, to wit, to legally dissolve a corporation. The taxpayer was required to dissolve the corporation in order to comply with a new Gardena ordinance which states that gambling institutions within its jurisdiction must forthwith be personally owned.

When the taxpayer offered the government employee payment for his time and services, the government employee, Masigla,

reported the offer to the Internal Revenue Service as an attempted bribe. He thereafter told the taxpayer that he had researched the area and that he could dissolve the corporation. Masigla never explained that he was neither permitted to do outside work nor to receive compensation for his services.

The facts presented in the taped conversations, as well as in the transcripts on appeal in the case herein, reveal that although Internal Revenue agent Masigla realized that the petitioner had no choice but to dissolve the corporation, he led the petitioner to believe that the corporation could be dissolved in only one way: by predating the corporate minutes.

The record herein further reveals that although Masigla told the petitioner that he could do this work, Internal Revenue Service regulations require that an agent ask permission to do outside work. Such permission was never requested by Masigla.

The petitioner constantly asked Masigla if everything was being done legally. Masigla told him that it was. The

petitioner asked Masigla if he should get an attorney to handle the actual liquidation. Masigla told the petitioner that that was not necessary.

At trial, Masigla testified that the petitioner's question, whether the corporation could be treated as a sole proprietorship, was a legitimate one; that he did not inform the petitioner that he was not allowed to moonlight because in training he had been taught that monetary offers should be left open and reported to Internal Security Inspection. Masigla therefore reported the offer as an attempted bribe.

At the time, Masigla understood that the corporation had to be dissolved to comply with the law; that the petitioner's old accountant was being uncooperative as far as turning over records; and that his new accountants didn't know what to do. The petitioner told Masigla that he wanted to dissolve the corporation in a way that would give him the best tax advantage within the law. Predating corporate minutes was Masigla's idea.

In United States v. Carroll, 518 F.2d 187, 200 (6th Cir. 1975), the Court stated that Courts must not permit "the process to be used in aid of a scheme for the actual creation of crime by those whose duty it is to deter its commission." When the government is employed to promote rather than to prevent or detect crime, it is directed toward an end for which it was not constituted. United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975); Notaro v. United States, 363 F.2d 169, 174 (9th Cir. 1975).

Throughout the several meetings with the petitioner, Masigla could have explained to the petitioner that by reason of his employment as an auditor for the Internal Revenue Service, he could not accept outside employment. Instead, he allowed the petitioner to participate in a situation that easily could have been prevented. If Masigla immediately had told the petitioner that he legally could not do the work, and the petitioner then had offered Masigla Two Thousand Dollars ($2,000) and a trip to Las Vegas, the situation clearly would have been different than that before this Honorable

Court. Absent a knowledge of the Internal Revenue regulation that agents cannot moonlight, a taxpayer would have no reason to suspect that an offer of compensation for employment readily accepted would be labeled a "bribe."

Further, by leading the petitioner to believe that there was only one way to achieve the necessary dissolution, and that this method would be legal, he inspired and persuaded the petitioner to commit a crime that the petitioner otherwise had no predisposition to commit. Masigla instructed the petitioner to predate the corporate minutes and to fill out certain forms.

> "[I]t is unconscionable and contrary to public policy to punish a man for a crime he evidently never would have committed were he not inspired, incited and persuaded by officials of the law. The Court decided that under such circumstances no crime was committed, for Congress could not have intended that an act within the literal meaning of a criminal statute would be a crime incited by

those whose purpose it is to prevent crime." United States v. Klosterman, 248 F.2d 191, 194 (3rd Cir. 1957).

Ironically, it was not apparent from the tapes or from the trial transcripts that the petitioner ever believed that he was committing an illegal act. On appeal, the Ninth Circuit stated that the trier of fact could justifiably believe that the petitioner was proposing a criminal scheme and had the necessary intent to violate the statutory requirements. The Court's rationale was omitted from the Opinion. It is respectfully submitted that the Court must have overlooked the petitioner's concern with complying with the law, in rendering its decision.

It is clear that Masigla played upon the ignorance of the petitioner, who had neither a criminal record nor a predisposition to achieve dissolution unlawfully, and thereby induced him to commit a crime. In order to prove that the offense of bribery was committed, the burden was on the government to prove that the petitioner had a corrupt intent to

influence or to be influenced in official conduct. United States v. Anderson, 509 F.2d 312, 329 (C.A. D.C. 1974). Yet, the crux of the instant situation is that the petitioner had no corrupt intent or predisposition to engage in unlawful activity when he offered Masigla employment. United States v. Hampton, 425 U.S. 488 (1976); United States v. Russell, 411 U.S. 423 (1973); United States v. Sorrells, 287 U.S. 435 (1932); United States v. Carroll, 518 F.2d 187 (6th Cir. 1975). Masigla had a duty then and there to inform the petitioner that such was illegal. To that end Masigla would have prevented the innocent offer from going any further.

> "When the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to a level of 'creative activity (United States v. Sherman, 356 U.S.

369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), substantially more intense than the level of such activity charged against the Government in numerous entrapment cases we have examined.'" Green v. United States 454 F.2d 783 (9th Cir. 1968).

Masigla enmeshed himself in criminal activity by failing to inform the petitioner of its illegality and by telling him that there was only one way to dissolve the corporation, that method being illegal. Under these circumstances, a criminal defendant should be acquitted as a matter of public policy.

The law should not function as a trap for the unwary, for those persons ignorant that what they are doing is a crime, and for those who are corruptly influenced and induced to commit crimes by government agents whose duty it is to uphold the law. It is submitted that it would be a better system to educate those ignorant of the law and protect from illicit influence those individuals with no predisposition to commit crimes, in order to achieve a just result.

The Due Process Clause of the Fifth Amendment to the United States Constitution cannot be coterminous with convictions for crimes based upon deceitful representations and inducement by government agents. It is therefore respectfully submitted that this Court grant Certiorari to determine if, before a taxpayer embarks upon a course of action which he does not know is illegal, the taxpayer discusses said course of action with an Internal Revenue agent who assists, encourages and advises the taxpayer to engage in said course of action for the sole purpose of obtaining a conviction, a conviction later obtained is thereby violative of the taxpayer's constitutional right to due process of law, and whether a government agent who knows that a taxpayer is unaware that he is participating in illegal activity has a duty to warn said taxpayer of the illegality.

CONCLUSION

WHEREFORE, for all of the reasons and upon all of the considerations set forth above, the petitioner respectfully prays that a Writ of Certiorari issue in the within case to review the decision of the Court of Appeals below.

Respectfully submitted,

RICHARD G. SHERMAN

Attorney for Petitioner Anthony

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 27 1977
Emil E. Melfi, Jr.
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,) No. 76-2731

vs.

) MEMORANDUM

DAVID ANTHONY,

Defendant-Appellant.)

Appeal from the United States District Court for the Central District of California

Before: TRASK, WALLACE and ANDERSON, Circuit Judges

David Anthony was charged in an indictment of a federal grand jury with three counts of attempting to bribe and bribing an agent of the Internal Revenue Service in violation of 18 U.S.C. § 201(b) (bribery, graft and conflicts of interest).[1/]

1/ 18 U.S.C. § 201(b) provides:

"(b) Whoever, directly or indirectly, corruptly gives offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person (continued)

He waived a jury trial and was thereupon tried to the court. The court found him not guilty on Counts One and Two of the indictment but guilty on Count Three. The evidence and the conclusions which might be drawn therefrom are sharply in conflict. Basically, appellant offered $2,000 and a free trip to Las Vegas, Nevada if an auditor of the Internal Revenue Service would do some work for him "on his own time" to liquidate a corporation with the papers back-dated. The result would be a considerable tax savings and savings in legal

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1/ (continued) who has been selected to be a public official to give anything of value to any other person or entity, with intent --

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or . . . ."

expense. Some of the conversations were taped. Appellant's side of the story was that he insisted frequently to the agent that he wanted nothing done which was illegal or in violation of the rules of the Internal Revenue Service.

Considering the entire testimony the trier of fact could justifiably believe that appellant was proposing a criminal scheme and had the necessary criminal intent to violate the statutory requirements. See Heely v. United States, 274 F.2d 389 (9th Cir. 1960). Under those circumstances we do not review the fact finding of the trial court except to determine whether there was substantial evidence, considered in a light most favorable to the government, to support a conclusion of defendant's guilt beyond a reasonable doubt. United States v. Pheaster, 544 F.2d 353, 383 (9th Cir. 1976). Here, the test was amply met.

We have considered appellant's related assignments and find them to be without merit.

Judgment AFFIRMED.

Office of the Clerk
United States Court of Appeals for the
Ninth Circuit
U.S. Court of Appeals and Post Office
Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

October 27, 1977

TO ALL COUNSEL:

RE: No. 76-2731 - U.S.A. vs. David Anthony

Dear Counsel:

An opinion was filed and judgment entered in the above case today, October 27, 1977, affirming the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

/s/ Emil D. Melfi, Jr.
Clerk of Court

See Rules: 36,40 and 41 of the Federal Rules of Appellate Procedure

CO 76.2

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 19 1977

Emil D. Melfi, Jr.
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,) No. 76-2731

vs.

DAVID ANTHONY,)

Defendant-Appellant.)

Before: TRASK, WALLACE and ANDERSON,
Circuit Judges

O R D E R

The panel as constituted above have voted unanimously to deny the petition for rehearing.

The petition for rehearing is denied.